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NO. 389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

ROBERT L. BERNER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether in a diversity suit brought in a federal court federal law ought to dictate the elements of an action for libel.

STATEMENT OF THE CASE

Respondent sent copies of its memorandum to its 64 exclusive sales brokers (A. 183[1]). Publication to these brokers admittedly could not harm petitioner, since petitioner and respondent sold through different brokers (A. 415, 417). With one exception, none of respondent's brokers were shown to have done anything with it except put it in

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[1] References herein to A. .... are to the Appendix to Brief for Plaintiff-Appellant in the Court of Appeals.

the wastebasket (A. 214-16). The single exception, a broker in Wisconsin, reprinted the memo and sent it to wholesale nut buyers (A. 134). No loss of sales was shown to have resulted from this single publication. In fact, despite this publication, petitioner's sales in Wisconsin increased after the memo had been distributed (A. 432-33).

Petitioner did present evidence that an altered memo had been seen by four of its exclusive brokers at six customer locations. Three of these customers did not buy from petitioner in the following year (A. 256, 278, 501-02). No evidence was introduced as to the prior purchases by these customers.

Petitioner eventually claimed the loss of 92 named customers in 1961 (fiscal year 1962) as a result of the memo. The names of these customers were revealed to respondent just prior to trial, after petitioner had claimed for over a year that it could not determine which customers had been lost as a result of the memo (A. 50-51, Interrogatory 11). The petitioner thus carefully shielded the names of these customers from respondent until it was too late to interview them. Petitioner's statement of the case[2] also fails to note that its total number of customers did not decline; its total custom in fact increased in the two years following publication of the memo, only to drop in the third year (Pl. Ex. 28; A. 327-28; 999-1032; 654-661).

To supplement this showing of changes in total custom, petitioner cited changes in net operating profits, in total sales and gross profits as well as changes in respondent's total sales (Petition, pp. 7-8). The Petition, however, omits to say that:

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[2] Petition for Writ of Certiorari, pp. 3 to 9, cited herein as Petition .....

(1) While its net operating profit decreased between fiscal 1961 and 1962, petitioner's gross profit on Brazil nuts, which is the subject of the memo, increased in fiscal 1962 by some $11,000 (A. 957, 974).

(2) While its net sales and gross profits declined, the great bulk of the decline occurred in almonds and black and English walnuts (A. 957, 974), which petitioner sells primarily to candy makers after having shelled them. No such person is on the list of "lost" customers, no such person ever saw the memo, and respondent sold no shelled nuts to anyone (A. 356-60).

(3) While respondent's gross sales did increase, respondent's primary business is fruits and vegetables rather than nuts, and there was no showing that the dollar change resulted from increases in total sales of nuts (A. 176-77).

Petitioner admitted that its accounting records included a ledger card showing the name, address and the date and dollar amount of every purchase by every customer (A. 395-398; Df. Ex. 16; A. 703). The ledger cards for the 92 customers it claimed to have lost in the year the memo was published were not introduced and the total amount of their purchases in the prior year was not put into evidence (See A. 338; 700-01). There was no showing that it would have been impossible or even burdensome to calculate and introduce these dollar amounts.

ARGUMENT

There are cases which raise the question of whether state or federal law governs the sufficiency of the evidence to take a case to the jury. This is not such a case.

Petitioner chose to rest its case on evidence relating to a

decline in gross sales after publication of respondent's memorandum. The court below did not, however, consider this evidence under either an Illinois or a federal standard of quantitative sufficiency. Instead, it held that evidence of a general decline in sales is simply no evidence at all of the existence of special damage.

It did so because the Illinois courts, consistently with the common law, have made special damage the basic element of the action for libel per quod, and have defined with some care what they mean by special damage. Proof of a general decline in sales is not, under that standard, relevant to the proof of special damage. The question below was therefore not one of sufficiency, but rather whether there was any evidence of special damage as state law defined that element. As Professor Moore would put it, the question here is whether fact X "satisfies the state requirement to prove element A." 5 MOORE, FEDERAL PRACTICE ¶ 50.06, p. 2350 (2d ed. 1968). His answer is that state substantive law governs the answer to such questions.

Precision in defining the elements of the action is not unusual in the law of libel. For example, courts have always reserved to themselves the power to declare an alleged libel per se non-actionable, so as to maintain absolute control over that element of the action. In doing so, they wholly deprive the plaintiff of an opportunity to have a jury decide whether it regards the words as tending to expose the plaintiff to hatred, contempt or ridicule. The retention of this power by the court is not thought to offend the Seventh Amendment. As recently as *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966) this Court recognized as salutory the common law rule that the question of whether a publication is privileged is, in the first instance, for the judge alone. The question of whether the facts show a privileged occasion is far more susceptible to analysis as one of quantitative

sufficiency than is the issue of special damage. Allocating it to the judge is inconsistent with normal federal practice. Yet neither this Court in *Rosenblatt* nor any other court has suggested that the Seventh Amendment contradicts the common law rule that a judge who finds the publication privileged need not submit that issue to a jury's re-examination. The rule has not been questioned because it is part of the essential substance of the law of libel, and raises no Seventh Amendment problem. The power of a state to define the elements of a cause of action, which is the question in this case, is even more clearly a part of the substantive rights of the parties, and cannot be abrogated, as petitioner would do, by referring to rules which govern only the mode and manner of trial.

Quantum of proof was, as a result, not the issue in the court below, and the only question actually argued to or decided by the Seventh Circuit in this case was the content of the common law of libel per quod. As we will show, neither the general Illinois rule of what comprises sufficient evidence to create a question of fact nor the quite similar federal rule was thought to apply or can be applied here. As a result, this case is hardly an appropriate vehicle for deciding which of those two rules ought to be applied by a federal court in the generality of diversity cases.

What the Petitioner Did.

The difference between the kind of issue petitioner seeks to raise and that which the case actually involves is illustrated by the procedural history of this case. The complaint was originally filed on the theory that respondent's memorandum to its brokers was libelous per se. The Court of Appeals held, in its prior decision in this case, that the memorandum was not libelous per se. 345 F.2d 395 (7th Cir. 1965). It went on to hold, however, that the memo

could be libelous per quod, and remanded for trial on that issue. Despite this holding, petitioner tried its case exactly as if the language of the memorandum had been held libelous per se. The evidence of a gross decline in custom and profits on which petitioner relied is precisely the sort of evidence traditionally introduced in cases of libel per se. McCormick, Damages, 422 (1935). In fact, Illinois courts have expressly held that such evidence is appropriate and will support a substantial verdict in a per se case. *Lion Oil Co.* v. *Sinclair Refining Co.*, 252 Ill. App. 92 (1929).

The crux of the decision below, however, was that such evidence has never been appropriate in libel per quod cases because it does not tend to prove special damage. The holding below thus was not that insufficient evidence of special damage had been introduced, but that none of the evidence tended to prove special damage. To allow such evidence to support a verdict for libel per quod would simply obliterate the distinction between libel per se and libel per quod — despite the existence of more than a dozen Illinois cases which affirm and apply the distinction as a part of the common law of Illinois.[3] It would also reverse the earlier, unappealed decision of the Court of Appeals in this case that respondent's memorandum was not libelous per se.

The Substantive Nature of Special Damage.

The Illinois cases hold that words which on their face are not actionable may become actionable if they have caused special damage. The requirement of proof of damage is thus not merely, as in the law of negligence, a measure of

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[3] *E.g. Life Printing and Publishing Co.* v. *Field*, 324 Ill. App. 254, 263, 58 N.E.2d 307, 311 (1944). The cases are listed in the opinion of the Court of Appeals, 393 F.2d 283, 286, n.2.

the plaintiff's recovery. It is, instead, the essential element of the action — the fact on which liability itself turns. Until special damage has been shown, the words are not actionable at all.

Petitioner's suggestion that a federal rule, drawn from federal law cases, supports its position that evidence of a decline in gross sales is sufficient, illustrates petitioner's misconception of the issue below. As the petitioner expressly states (Petition, p. 13), these federal cases assume that a violation of law has been shown; only the dollar amount of the injury remains to be shown. In contrast, without proof of special damage, words libelous per quod are harmless, and violate no rights. As the Sixth Circuit has put it, special damages is "the *sine qua non*" of an action for libel per quod. *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 383 F.2d 352, 356 (1967), *cert. denied*, 390 U.S. 949 (1968). It was precisely for this reason that the Sixth Circuit in the *Electric Furnace* case refused to sustain a verdict based on a libel per quod when the only proof of damages was a showing of a general decline in sales. See also *Landstrom* v. *Thorpe*, 189 F.2d 46 (8th Cir.), *cert. denied*, 342 U.S. 819 (1951).

Moreover, application of the Illinois requirement of special injury cannot be thought to offend the Seventh Amendment when exactly the same requirement was imposed in federal courts before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *Erick Bowman* v. *Jensen Salsbery Laboratories, Inc.*, 17 F.2d 255, 259-261 (8th Cir. 1926), for example, holds that the common law of libel required dismissal of an action for libel per quod because the plaintiff had not shown that it was specially damaged. The case was decided on the pleadings, but the Eighth Circuit's opinion makes it perfectly clear that the decision is based on the

substantive law of libel per quod, rather than on any peculiarity of pleading rules. It is thus clear that the court would have reached exactly the same result if the case had reached it only after a trial.

The *Erick Bowman* opinion is relevant here in a second way. In addition to establishing that the special damage rule, rather than any rule relating to quantitative sufficiency, would apply even if federal law governed this cause, the opinion makes clear that federal law would have rejected evidence of a decline in sales as proof of special damage. *Erick Bowman* holds that a plaintiff who has a wholly transitory class of customers and, as a result, cannot show that he lost customers or who those customers were, is the beneficiary of a special variation of the rule of special damage. Such a plaintiff can recover for a libel per quod if he establishes (1) a decline in sales and profits from an established level, (2) facts showing that the decline was the natural and probable result of the publication, and (3) that he could not allege the names of customers who withdrew or withheld their custom. 17 F.2d at 261. The Eighth Circuit in *Erick Bowman* held that the plaintiff was not entitled to the benefit of this exception to the rule of special damage.

The application of the *Erick Bowman* exception, which allows a plaintiff to rely in part on proof of a general decline in custom if it can also establish that it did not know the names of its customers, to this case was a major issue in the courts below.[4] For this Court to now hold that evi-

[4] The argument below turned in part on whether *Erick Bowman* represented the law of Illinois, and how it might affect this cause. Neither party urged at any point that a federal rule of quantitative substantiality instead governed the case.

dence of a general decline is enough to turn words not libelous on their face into actionable words would thus broaden the *Erick Bowman* exception into the general rule of libel per quod to be applied in federal courts. *Erick Bowman* holds that federal common law forbids such a result. The Seventh Amendment, by its very terms, cannot be thought to require what the common law forbids.

The Nature of State and Federal Sufficiency Standards.

The nature of the issue which petitioner raises also shows that this case simply is not an appropriate vehicle for its decision. Petitioner phrases the issue as whether a state or federal test of sufficiency of the evidence should be applied. The difference between the state and federal rules regarding sufficiency of the evidence is the difference between courts which say that an issue must go to the jury (1) in Alabama, if there is a "scintilla of evidence" to support it;[5] (2) in the Fifth Circuit, if the proven facts give support to the inference necessary to sustain a plaintiff's case, even though they give equal support to a contrary inference;[6] (3) in Illinois, unless the evidence, viewed most favorably to the opponent, so overwhelmingly favors movant that no contrary verdict could stand;[7] (4) in Connecticut, unless all of the evidence, viewed most favorably to the party against whom the court would rule, is such that rea-

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[5] *T. R. Miller Mill Co.* v. *Ralls*, 280 Ala. 253, 192 So.2d 706 (1966).

[6] *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir.), *cert. denied*, 389 U.S. 930 (1967).

[7] *Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill.2d 494, 229 N.E.2d 504, (1967). The positions on this issue of each of the states is summarized in this careful exposition of the Illinois rule, which appears to be at least as liberal to plaintiffs as the "federal rule" adopted in *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir.), *cert. denied*, 389 U.S. 930 (1967).

sonable minds would reach the same conclusion.[8] The range of phrasings, except for Alabama's scintilla rule, is not broad, and any difference in result is more likely to depend more on the facts before the court than on which phrasing of the rule applies.

What is startling, of course, is that under any of these standards, if they had anything to do with this case, the result below would be wrong. Had the Seventh Circuit thought the question simply one of dollars, and applied a quantitative standard taken from any case, state or federal, it would have sent this case back for a new trial. It did not because the question before it had nothing to do with sufficiency of the evidence. It is, ultimately, in this sense that this record does not raise the question of which standard, state or federal, applies in diversity cases, and the choice between those standards cannot be made by granting review of this case.

Erie and the Rule of Special Damages.

The courts below decided that petitioner had not proven special damages as state law defined that term. Petitioner does not assail that finding. The sole basis for its Petition is that federal law and the command of the Seventh Amendment grant license to submit general evidence of loss even though state law holds it insufficient to establish an action for libel per quod. However, such a result would clearly conflict with the principles of *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938). The Petitioner seeks to avoid this conflict with *Erie* by casting the problem as one involving only a narrow question of sufficiency of the evidence. But no state-federal choice of law problem can be decided without initially referring to the general principles of *Erie.* As a result, the initial question before this Court, if *certiorari*

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[8] *Johnson* v. *Consolidated Industries, Inc.,* 153 Conn. 522, 218 A.2d 380 (1966).

were granted, would be whether the special damages rule could, under *Erie,* be considered procedural for any purpose relevant here. The answer to that question is clearly no.

We do not, of course, mean to suggest that no evidence of dollar loss was submitted by the petitioner in the district court. Some was. As we have shown, the nature of that evidence illustrates why the result which petitioner urges, far from merely preserving any legitimate federal considerations, would effectively expunge the Illinois substantive law of libel per quod, creating a new right of action where none now exists. Such a result would flout the twin aims of the *Erie* rule: discouragement of forum shopping and the avoidance of inequitable administration of the laws. It would permit recovery in a federal forum on the basis of a state created cause of action even though that recovery is totally inconsistent with the state requirements of actionable defamation which are made "strict in the interest of protection of free expression." *Whitby* v. *Associates Discount Corp.,* 59 Ill. App. 2d 337, 207 N.E.2d 482, 485 (1965).

This Court, and the courts of appeals, have applied federal standards in diversity actions in ways which may, but not predictably so, produce a different result from that which might occur in a state court. However, those instances are restricted to the presence of overriding considerations of a competing federal policy involving the administration of the judicial power on such questions as the mode and form of trial. Such a case is *Byrd* v. *Blue Ridge Rural Cooperative, Inc.,* 356 U.S. 525 (1958).

In *Byrd* this Court held that the allocation of deciding a particular question in a federal court should be made in favor of the jury in accordance with federal practice where the contrary state allocation was not bound up with the definition of the substantive rights and obligations of the parties. The core of the decision was that the state rule was

not an integral part of the right created by state statute, that the state rule would require the disruption of the relationship between judge and jury in a federal court, and that there was no predictable certainty or strong possibility that the outcome of the litigation might be substantially affected by whether the question was decided by a judge or jury. 356 U.S. at 535-40. Compare *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956).

But this Court also made clear in *Byrd* that if the state allocation of judge-jury functions were an integral part of and bound up with the definition of the rights and obligations of the parties under state law, a different result might prevail. *Cf. Dice* v. *Akron, C & Y. R. Co.*, 342 U.S. 359 (1952).

More importantly, regardless of how one interprets the principles of *Byrd*, the federal courts and this Court have never applied federal standards so as to create a whole new cause of action—or as would be true here—to totally obliterate a substantive branch of the state's common law. Under Illinois law, special damages is, as we have demonstrated, substantive in every traditional sense. It is the heart of the action and the type of issue which *Erie* commands be determined according to state law, similar to the issue in *Erie* itself of whether the railroad owed a duty of care to Tompkins as a trespasser or licensee.

No amount of invocation of *Byrd*, the Seventh Amendment or the requirements of federal law can turn that issue into something which it is not. This Court's opinion in *Byrd* itself makes that clear, for it notes that the *Byrd* rationale was not contrary to the Court's earlier decision in *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464 (1940) which held that the federal court should follow the

state rule defining evidence of whether the state-created right was established. 356 U.S. at 540, n. 15.

The very type of general loss evidence which petitioner introduced below, and which it claims now should be held to establish a cause of action under state law which denies that result, clearly shows how much in conflict such a holding would be with *Erie* and its progeny. For there is no question that if petitioner's view prevails, the type of evidence it introduced would have entitled it to a verdict in the district court. Any publication capable of being held libelous per quod under Illinois law would similarly provide a verdict on the basis of evidence which the state permits only in libel per se cases and deems not probative in libel per quod cases. Not only could such a result substantially affect the outcome of litigation in a federal court, it would with certainty do so in all cases, having nothing whatsoever to do with judge-jury allocations or other countervailing federal principles found essential in *Byrd*. That result is surely prohibited by *Erie*. It would be prohibted even if the state law involved a disruption of the judge-jury allocation in a federal court. Under the guise of housekeeping matters cast in the shibboleth of the Seventh Amendment, petitioner would accord to a federal court in a diversity case the power to define and to ignore the substantive rights and obligations of the parties which the Rules of Decision Act denies. To do so here would require this Court to overrule every *Erie* case decided in the last 30 years, including *Byrd*. See for example, *Palmer* v. *Hoffman*, 318 U.S. 109 (1943); *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Ultimately, petitioner's attack (Petition, pp. 15-16) is directed not to the issue of whose law should apply, but

to the difficulty of meeting the burden which the common law imposes. Admittedly, Illinois does not embrace a very generous law of libel. Libel per se has been restricted, as a matter of the state's policy regarding free expression, more closely than is true in any other state. *John* v. *Tribune Co.*, 24 Ill.2d 437, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962). The state's recognition of libel per quod has not exceeded the narrowest of the common law rules. Petitioner does not like these Illinois restrictions on the law of libel. But it is not entitled to change them merely because it is of diverse citizenship.

Moreover, while the burden is difficult, it is not insurmountable because the federal common law imposed exactly the same standard, and it might have been met if petitioner had not chosen to hide the names of the customers it claimed to have lost until immediately before trial, had calculated the amount of their prior purchases and had introduced enough evidence of circulation to show that those customers had seen the memo. As the District Court concluded, these failures showed "an assiduous effort to remain in the dark" (Petition, p. 31) rather than an impossible burden of proof.

Rather than introduce this evidence, on which an inference of special damage might have been based, petitioner chose to introduce what the Court of Appeals called a "potpourri concept of dollar amounts of damages" (Petition, p. 22), all presumably far larger in amount than the sales which could have been affected by the respondent's memo.

This record thus discloses no more than a deliberate effort to avoid proof of special damage and to substitute proof of a very different sort in an effort to recover far more than could be recovered in an action for libel per quod. The question is not one of impossibility or unfair-

ness; it is one of the power of a state to determine its common law, and it cannot be decided by suggesting that the matter involves only a question of housekeeping rules in federal courts.

CONCLUSION

The Petition discloses no basis for the exercise of this Court's certiorari jurisdiction. No federal question of substance involving the considerations delineated in Rule 19 is presented. What the Petition presents is, at best, a disingenuous constitutional contention on a record showing not that petitioner was denied a jury trial, but rather its total failure to establish a cause of action.

For the above reasons, respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

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